

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 286 of 1998.

Judgement reserved on: 17.7.2007.

Date of decision: 26.7.2007.

Sarbjeet Singh

..... Appellant.

Vs.

Chander Parkash

.... Respondent.

Coram

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?

**For the Appellant : Mr. R.L.Sood, Senior Advocate with
Mr. Sanjeev Kumar, Advocate.**

For the Respondent : Mr. Anand Sharma, Advocate.

Kuldip Singh, Judge.

The defendant is in appeal against judgement and decree, dated 31.3.1998, passed by District Judge, Chamba in Civil Appeal No. 19 of 1994, confirming the judgement and decree, dated 21.3.1994, passed by the learned Senior Sub Judge, Chamba camp at Dalhousie in Civil Suit No. 27 of 1990.

2. The facts in brief are that plaintiff filed a suit for permanent prohibitory injunction against two persons, namely Sarbjeet Singh and Jasjeet Singh regarding land comprised in khasra Nos. 11, 15, 18, 19, 22, 31, 32 and 35. The case of the plaintiff is that he is owner in possession of land comprised in khasra Nos. 14, 16, 17, 20, 22 to 29 and 33, Kitas 13, measuring 3-14-05 Hectares,

Whether the reporters of the local papers may be allowed to see the Judgment?

Khewat No. 11, Khatauni No. 33, situate in Up-Mohal Kathlog also known as Kirti Estate. The defendants are owners in possession of land comprised in khasra Nos. 1/1, 2 to 10, 12, 13, Kittas 12, Khewat No. 15, Khatauni No. 39, known as Arman Estate, situate in Up-Mohal, Kathlog, Tehsil Bhattiyat District Chamba. There is "Gair Mumkin Rasta Sare-aam", comprised in khasra Nos. 11, 15, 18, 19, 22, 31, 32 and 35, which is owned by Government of Himachal Pradesh. This passage starts from Mohal Lahad and goes to village Kathlog. This passage is used by the plaintiff and residents of village Kathlog and Lahad from time immemorial as of right.

3. The defendant No.1 wrote a letter to plaintiff on 15.5.1990, declaring that the passage in question belongs to him, the plaintiff and his men are trespassing his estate and they should not use this passage forthwith. The plaintiff got confirmed the ownership of the passage from the S.D.O. (Civil), who informed him vide letter, dated 18.5.1990, that the passage is owned by Government of Himachal Pradesh and is common approach road. The plaintiff informed defendant No.1 that passage is a common approach and he has no right to stop plaintiff from using the passage. The defendant No.1 sent a telegram to the plaintiff threatening him of dire consequences if the plaintiff would use the said path. On these grounds, the plaintiff filed a suit for permanent prohibitory injunction against defendants No. 1 and 2, restraining them not to interfere in peaceful use of the passage comprised in khasra Nos. 11, 15, 18, 19, 22, 31, 32 and 35. The name of defendant No. 2 Jasjeet Singh was deleted vide order dated 12.10.1990 of the trial court.

4. The defendant Sarbjeet Singh contested the suit by filing a written statement. He has taken preliminary objections of maintainability, delay, laches, the plaintiff is not the owner of the passage, therefore, he has no right to file the suit. The suit is bad for want of necessary party, namely Government of Himachal Pradesh, the suit is malafide. On merits, it has been submitted that defendant is owner of Arman Estate and khasra numbers mentioned in para-2 of the plaint are part of Arman Estate. It was denied that the passage in question belongs or ever belonged to the plaintiff or was owned by Government of H.P or was ever used by anyone including the plaintiff. The passage, in question, is not common passage, rather it is part of defendant's estate. On these grounds, defendant Sarbjeet Singh, prayed for dismissal of the suit.

5. The trial court decreed the suit on 21.3.1994. The defendant filed an appeal against decision dated 21.3.1994 and the appeal was dismissed by the learned District Judge on 31.3.1998. The defendant is now in second appeal in this court.

6. The appeal was admitted on the following substantial questions of law:-

1. Whether the suit was maintainable in view of the provisions of the specific Relief Act?
2. Whether the suit could proceed without impleading the State of H.P. as party?
3. Whether the courts below could place reliance on the evidence of the plaintiff which cannot be legally formed as evidence?

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4. Whether the misreading, misinterpretation and mis-appreciation of evidence has resulted failure of justice?

7. I have heard the learned counsel for the parties and have gone through the record.

8. The learned counsel for the defendant/ appellant has submitted that the plaintiff has failed to prove that the passage in question is owned by Government of H.P. and that it is used by plaintiff as common passage or by way of an easement. There is no legal evidence on record to decree the suit of the plaintiff. The courts' below have misread and misinterpreted the evidence on record. The Government of Himachal Pradesh is a necessary party. The suit is not maintainable.

9. The learned counsel for the plaintiff has submitted that plaintiff has proved that the passage in question is owned by Government of H.P. The defendant has failed to prove that the passage is owned by him. The threatened acts of the defendant have been proved on record. The Government of H.P. is not a necessary party. He has supported the impugned judgement and decree.

Substantial question of law No. 1.

10. The suit is for permanent prohibitory injunction. The case of the plaintiff is that there is Gair Mumkin Rasta Sare-aam on land comprised in khasra Nos. 11, 15, 18, 19, 22, 31, 32 and 35, which is being used by the plaintiff and residents of village Kathlog and Lahad from time immemorial as of right. The defendant is threatening the plaintiff that he had issued instructions to his men to

construct a gate over this path. The defendant had written a letter, dated 15.5.1990 to plaintiff, declaring that path belongs to him. The plaintiff has filed the suit and pleaded his right in the plaint, he has prayed for permanent prohibitory injunction against the defendant not to interfere in peaceful user of the passage by the plaintiff. The defendant has projected that suit is not maintainable, under Section 41(h) of the Specific Relief Act, 1963. The suit for permanent prohibitory injunction filed by the plaintiff against the defendant is maintainable and the same is not barred, under Section 41(h) of the Specific Relief Act. The plaintiff has every right to approach the civil court against the threatened acts of defendant. The substantial question of law No. 1, is answered against the defendant.

Substantial question of law No.2.

11. The plaintiff except for asserting right of user of the passage has not pleaded title in himself of the land covered by the passage. He has pleaded clearly that passage is owned by Government of H.P. but it is being used by plaintiff and other residents of village Kathlog and Lahad from time immemorial. The plaintiff has not prayed any relief against the State of Himachal Pradesh. The suit has been filed against the threatened acts of the defendant. The lis is in between the plaintiff and defendant and any finding given by the court shall determine the rights of the plaintiff and defendant over the passage and not of the State of Himachal Pradesh. In the facts and circumstances of the case, the State of Himachal Pradesh is not a necessary party in the suit and the substantial question of law No.2 is answered against the defendant.

Substantial questions of law No. 3 and 4.

12. The substantial questions of law, No. 3 and 4, are interconnected, and, therefore, both the questions are being decided together.

13. The learned counsel for the defendant has submitted that there is no legal evidence on record to show that land covered by the passage, in question, is owned by the State of Himachal Pradesh, nor there is evidence to the effect that the land under the passage is possessed by the Municipal Council, Dalhousie. He has submitted that in fact the present case is of no evidence. The two courts below have misread, mis-interpreted the material on record and have erred in decreeing the suit of the plaintiff.

14. PW 3 Ramesh Chand, Patwari, Circle Dalhousie, while appearing as a witness, has deposed that he was posted in Circle Dalhousie as Patwari since 1987 and Aks-sajra Tatima Latha Ex. P-5, is correct, as per Latha brought by him in the Court. He had brought jamabandi at the time of making the statement in the court and stated that khasra Nos. 11, 15, 18, 19, 22, 31, 32, 35, 37, 40, 44, 46, 49, 50 and 52 constitute an open passage, owned by State of Himachal Pradesh and in possession of Municipal Council. This passage passes through the holdings of the parties. In cross-examination, he has stated that Latha brought by him in the court was prepared in the recent settlement. He had brought in the court old Latha also. He has denied the suggestion that this passage is not open to public.

15. PW 2 Mani Ram, has stated that he sold the land to plaintiff below Kathlog. This land was owned by his brother in law

Sant Ram, who has died. He was born in Dalhousie. There is a passage starting from motor road through the holdings of the parties which ultimately joins Kathlog road. He had seen this passage even twenty years prior to when he sold the land. This passage is used openly by the public. PW 4 Smt. Puni Devi has stated that the path, in question, passes through her land and the land of the parties. In cross-examination, she has denied that the path is of the defendant, but stated that it is open to public. The stairs on this passage were constructed by P.W.D.

16. PW 1 Chander Parkash, plaintiff has supported his case generally and has placed on record letter, dated 15.5.1990 Ex.P-1 of plaintiff, Ex. P-2, letter dated 15.5.1990 of plaintiff to Sub Divisional Magistrate, Dalhousie and letter dated 18.5.1990 Ex. P-3 of Sub-Divisional Officer (Civil) of Dalhousie to plaintiff, as well as telegram Ex. P-4, dated 29.6.1990, of plaintiff.

17. Defendant has appeared as DW 1 and has placed on record sale deed Ex. D-1, vide which some land was purchased by his grand-father. He has stated that passage, in question, is owned by him. The State is not the owner of this passage nor this passage is used by the plaintiff. He has also deposed that on the instructions of State of Himachal Pradesh, the Superintending Engineer, HPPWD constructed this passage and handed over to him. He did not receive any notice during settlement.

18. It is pertinent that PW 3 Ramesh Chand, Patwari proved "Aks-Sajra Tatima Latha" Ex. P-5, and has stated that there is an open passage on khasra Nos. 11, 15, 18, 19, 22, 31, 32, 35, 37, 40,

44, 46, 49, 50 and 52, which is owned by State of Himachal Pradesh and possessed by Municipal Council. This witness appeared in the court alongwith Latha prepared in the settlement, old Latha and the jamabandi. He made the statement in the court on the basis of record. He was not cross-examined regarding the ownership and possession of khasra Nos. 11, 15, 18, 19, 22, 31, 32, 35, 37, 40, 44, 46, 49, 50 and 52. The non-cross examination of this witness, who appeared in the court alongwith record, on vital points regarding the ownership and possession and the nature of land comprised in khasra Nos. 11, 15, 18, 19, 22, 31, 32, 35, 37, 40, 44, 46, 49, 50 and 52, is sufficient to indicate that defendant has admitted that land comprised in khasra Nos. 11, 15, 18, 19, 22, 31, 32, 35, 37, 40, 44, 46, 49, 50 and 52, is an open passage, owned by State of Himachal Pradesh and in possession of Municipal Council.

19. PW 4 Smt. Puni Devi, has stated that the land, in question, is an open passage and stairs were constructed by P.W.D. on it. The defendant himself has stated that on the instructions of State of Himachal Pradesh, the Superintending Engineer, HPPWD, constructed this passage and handed over to him. The construction of passage by the P.W.D. goes to show that the land under the passage is owned by Government and it is an open passage and that is why the Public Works Department constructed the passage. The defendant has placed nothing on record that for maintaining the passage, he has ever spent any amount.

20. The learned counsel for the appellant- defendant has submitted that vide order, dated 11.10.1996, the learned District

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Judge ordered the spot inspection for proper appreciation of the evidence led by the parties and some dates were fixed for spot inspection, but spot inspection was not carried out. The learned District Judge, vide order, dated 27.9.1997 declined to inspect the spot and thereafter heard the matter and decided the appeal. He has submitted that refusal of the learned District Judge to inspect the spot is in deviation to his own order, dated 11.10.1996 and in absence of spot inspection, the learned District Judge has mis-appreciated the evidence on record. No doubt, learned District Judge, vide order, dated 11.10.1996, ordered spot inspection on 14.12.1996, but on that date, the spot could not be inspected. On 27.2.1997, the case was fixed for spot inspection on 4.5.1997, but in the meantime, the Presiding Officer was transferred and spot inspection could not be carried out. On 15.5.1997, the case was again fixed for spot inspection on 15.6.1997. It appears, on some request, the case was taken up on 13.6.1997 in the presence of learned counsel for the parties and the case was fixed on 9.8.1997 for spot inspection and the case was put up in the court on 8.8.1997. On 8.8.1997, parties were not present and on the request of learned counsel for the parties the case was adjourned to 4.9.1997 for fixation of date for spot inspection. On 4.9.1997, the case was fixed for spot inspection on 28.9.1997, but case was to be taken up in the court on 27.9.1997. On 27.9.1997, parties were not present, but their counsel again made request for fixing another date for spot inspection. In these circumstances, on 27.9.1997, the learned District Judge declined to fix any date for spot inspection and fixed the case for arguments.

The perusal of various orders, from 11.10.1996 to 27.9.1997, on lower appellate court file would show that at one point of time, the appellant –defendant was interested for spot inspection, but later on he did not cooperate for spot inspection despite several dates fixed by lower appellate court to this effect. In these circumstances, the learned District Judge, cannot be blamed for not conducting spot inspection. The existence of passage was not disputed by the defendant. What was disputed was the ownership and possession of the land under the passage, location and the right of the plaintiff to use the path, which is to be decided on the basis of evidence on record and not by visiting the spot. There was no application for demarcation of land covered by passage.

21. The learned counsel for the appellant- defendant has submitted that passage, in question, is situated on the land of the defendant covered by sale deed Ex. D-1. The defendant has failed to prove that passage, in question, is situated on land covered by the sale deed Ex. D-1. PW 3 has specifically stated that path is owned by State of Himachal Pradesh and is in possession of Municipal Council, Dalhousie. The learned counsel for the appellant- defendant has also submitted that Aks-Sajra Tatima Ex. D-5, does not prove public path, as claimed by the plaintiff. It has come in the statement of PW 3 that khasra Nos. 11, 15, 18, 19, 22, 31, 32, 35, 37, 40, 44, 46, 49, 50 and 52, are owned by State of Himachal Pradesh and in possession of Municipal Council. PW 3 Ramesh Chand, Patwari, made the statement on the basis of the record. He was not cross-examined on the question of ownership and possession of the path, in question.

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Therefore, from the material on record it is proved that the passage, in question, is open passage owned by State of Himachal Pradesh and in possession of Municipal Council. The submission of the learned counsel for the defendant that passage was not dedicated to the public by the defendant and, therefore, nobody has any right in the passage, has no force in view of the finding recorded above that the passage, in question, is owned by the State of H.P. and is in possession of Municipal Council, Dalhousie, as an open passage for all. Therefore, the question of dedication by defendant does not arise.

22. In view of above discussion it is clear that no fault can be found with the impugned judgement and decree. The learned District Judge has appreciated the material on record correctly. The learned counsel for the defendant has failed to make out any case for interference by this court. The substantial questions of law No. 3 and 4, are decided against the defendant- appellant.

23. The result of the above discussion is, the appeal is dismissed. No costs.

CMP No. 788 of 2001.

24. Interim order, dated 8.10.2001, stands vacated and the application is dismissed.

July 26, 2007.
(Hem)

(Kuldip Singh)
Judge.